Supreme Court, U.S.
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NO. 10-438

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLENE J. GOOD and RICHARD C. GOOD,
Petitioners

v.

CITY OF SUNBURY,
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the 3rd Circuit

PETITION FOR WRIT OF CERTIORARI

Richard C. Good
Charlene J. Good
3018 Ridge Road
Northumberland, PA 17857
570-473-3042

QUESTION PRESENTED

In 1976, in Paul v. Davis, 424 U.S. 693, 694, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), the Supreme Court held that a claim for violation of procedural due process under 42 U.S.C. §1983 and the Fourteenth Amendment could not be based upon defamation alone. This case held that the Plaintiff must establish a stigma to her reputation plus a deprivation of some additional right or interest. The question presented in this case is whether a Plaintiff who has alleged that she was defamed and suffered a psychological injury as a result has satisfied the "stigma plus" test.

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all the parties.

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The Opinion of the Court of Appeals for the Third Circuit which affirmed the Opinion of the U.S. District Court for the Middle District of Pennsylvania which granted summary judgement for the Defendant were entered November 16, 2009 and February 5, 2008 respectively. These decisions were not reported and are reproduced in the Appendix.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Richard and Charlene Good are a married couple who own multiple rental properties in Sunbury, Northumberland County, including a ten (10) unit complex 250-260 Race Street. The City of Sunbury by Resolution of August 9, 2004 established a procedure by which the City Council could designate a property as a "nuisance property" if said property was the subject of three (3) founded police or municipal code complaints within a twelve (12) month period. The City Council of Sunbury voted on August 8, 2005 to designate the Good's property at 250-260 Race Street as a "nuisance." This vote was publicized on local television and in the Sunbury newspaper, The Daily Item. The Goods objected to the designation as being unfair and entered through a legally defective process. On September 13, 2005, the City Council voted to remove the Goods from the list.

The alleged code violations at 250-260 Race Street concerned the alleged failure of the Goods' tenants to remove their garbage and/or properly contain their garbage. The Goods dispute that there were three founded complaints about the property in the twelve (12) months preceding the vote. The Goods further allege that the procedure of designating a property to be a nuisance did not meet minimal standards of due process because it did not define the terms "nuisance" or "founded" nor provide a procedure to challenge or appeal the designation.

Plaintiff Charlene Good claims that she suffered severe mental and emotional harm as a result of designation of her as a public nuisance. She has provided an expert report from her psychologist, Fred Gimino, Ph.D., to support her claim. The City has had Ms. Good examined by its own independent medical examiner, Dr.

Barbara G. Kuhlengel, who concluded that she has psychological problems, to wit, Post Traumatic Stress Disorder. Dr. Kuhlengel further stated in her report to the City's attorney(p. 6):

YOUR QUESTIONS:

Which, if any of the Plaintiff's psychological complaint's are caused by the Township's(sic) conduct?

The Plaintiff's psychological response the Township's conduct resulted in problems with anxiety, sleeplessness, hyperactivity, crying, suicidal thoughts, nightmares, worry, dwelling, social withdrawal, inability to eat, weight loss, inability to concentrate and disorganized functioning.

It appears from the record that there is no dispute of fact as to the causation of Ms. Good' psychological problems.

The Goods filed suit in District Court on November 22, 2006, alleging violations of 42 U.S.C. § 1983 and the Fifth and Fourteenth Amendment Due Process Clauses, as well as supplemental state law claims for defamation. intentional infliction of emotional distress, and invasion of privacy. Sunbury moved for summary judgment on December 4, 2007. On February 5, 2008, the District Court granted summary judgment for Sunbury on the Fifth Amendment claim because "the Fifth Amendment is not applicable to state action." Memorandum and Order, Good v. City of Sunbury, NO. 06-CV-2268 (E.D.Pa. Feb. 5, 2008) ("D.C.Op.") at 8.

The U.S. Court of Appeals for the Third Circuit upheld the summary judgement in an opinion entered November 16, 2009. The Third Circuit held that psychological injury could not be the basis for a "stigma plus" claim and that it would be contrary to public policy

to permit the psychological injuries to be the basis of a "stigma plus" claim because it would potentially flood the federal courts with questionable defamation proceedings.

REASONS FOR GRANTING THE WRIT

I.
THE THIRD CIRCUIT'S HOLDING THAT A PSYCHOLOGICAL INJURY IS INSUFFICIENT TO MEET THE STIGMA PLUS TEST IS INCONSISTENT WITH PAUL v. DAVIS

The Supreme Court in Paul vs. Davis, 424 U.S. 693, 694, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) clearly held that a litigant who is seeking redress under 42 U.S.C. §1983 for alleged stigmatization by a governmental unit must plead a "stigma plus" of a tangible harm to a liberty or property interest separate from the litigant's interest in her reputation. The Petitioners herein argue that psychological injury which is established by two written reports of psychologists is sufficient to meet this steep burden. The Paul Court did not define the requirements of "stigma plus" in any great detail and therefore it has been left to the Court of Appeal to define these requirements. This requirement, the stigma plus" test, has been described as "enigmatic," Hill v. Borough of Kutztown, 455 F. 3d 225, 236 (3rd Cir. 2006), and has not been fully demarcated by case law. The Third Circuit has noted that whether the "plus" or "more tangible interest" must be a "protected property interest" or whether some lessor right under the Due Process Clause would suffice is an unresolved issue. *Baraka v. McGreevey*, 481 F.3d 187, 208, 209 (3d Cir.2007).

The Third Circuit held that Mrs. Good's claim was not sufficiently tangible because it was a claim for psychological harm. The Third Circuit analogized this claim to that of Amiri Baraka, the former poet laureate of New Jersey who was terminated after making inflammatory comments post the 911 terrorist attacks.

Mr. Baraka sued the State of New Jersey and plead irreparable damages to his reputation, embarrassment, humiliation and emotional distress by his being stigmatized as an anti-Semite. Notably, Mr. Baraka did not allege or establish through discovery that he had suffered a psychological injury. The Third Circuit affirmed the granting of a summary judgement against Mr. Baraka because he did not plead any injury to a tangible right other than his reputation. In the Good decision, the Third Circuit then stated that Baraka "strongly suggested" but did not hold that the emotional distress suffered attendant to reputational harm does not constitute a valid "plus" factor for purposes of the "stigma plus" requirement. With all due respect, the facts in Baraka and *Kelly v. Borough of Sayreville, N.J.*, 107 F.3d 1073 (3d Cir.1997) are distinguishable because the litigants therein made boilerplate allegations of emotional harm but did not have any substantive evidence of a psychological injury nor any expert testimony to establish the same.

The Third Circuit has confused a claim for psychological injury with a claim for emotional distress or hurt feelings. Paul and its progeny correctly preclude litigants from turning a garden variety defamation case into a federal §1983 case by establishing that hurt feelings and bruised ego are not sufficient to meet the "stigma plus" test. But nowhere do these line of cases make the bright line declaration that all claims of psychological injury are barred. They simply state that the "plus" must be tangible. The Petitioners submit that a well documented psychological injury should meet this requirement because persons have a liberty interest in their good health. The concept of good health is distinct and more serious than the interest in reputation.

A claim of psychological injury is not too ethereal to

be a valid basis for a stigma plus claim because it must be established through the reports and testimony of mental health professionals such as psychiatrists or psychologists. This expert testimony will be subject to the Rules of Evidence and the right of cross examination. If the evidence is vague or ethereal, the claim will fail. Psychological injury and harm is a recognized medical condition and subject to the same standards of proof as to another medical malady. Certainly, if a person pursued a "stigma plus" claim on the basis that the stigma caused the person to sustain a heart attack or stroke, the claim would survive summary judgement if there were medical documentation for the injury. A claim of psychological harm should not be treated disparately.

The Paul v. Davis decision has been wrongly taken to be a determination that "stigma plus" cases are to be discouraged. In fact, Paul recognizes the validity of "stigma plus" case and their utility so long as the "plus" is tangible. All the Petitioners ask for is a consideration of the legitimacy of a proven psychological injury as a tangible plus.

II.

THE THIRD CIRCUIT'S HOLDING THAT THE RECOGNITION OF A PSYCHOLOGICAL INJURY AS SATISFYING THE STIGMA PLUS TEST IS AGAINST PUBLIC POLICY IS FALSE AS THERE ARE ADEQUATE REMEDIES TO PREVENT THE COURTS FROM BEING FLOODED WITH FRIVOLOUS DEFAMATION CASES

The Third Circuit added a public policy rationale to its decision by asserting that permitting the Goods' case to proceed would open up the Courts numerous and possibly frivolous defamation claims masquerading as

civil rights actions. This concern is misplaced as sustaining the Goods' case would only open the door to litigants who have specific evidence of a psychological injury through a medical report. Vague and generalized claims of emotional distress would still be precluded. The Petitioners assert that public policy actually supports their claim because otherwise Mrs. Good has no avenue of redress for her stigmatization and injury. Her state law claims for defamation are precluded by state sovereign immunity so a civil rights action is her only opportunity to receive redress.

The Good's case appears to the only Court of Appeals decision in which a "stigma plus" litigant presented a written report in support of psychological injury. In fact, a Westlaw query of federal cases which involve "stigma plus" and "psychological injury" put the Good's circuit and district court opinions at the first and second position. There is a need for the Supreme Court to settle this issue and set forth whether a well-established psychological injury will satisfy the "stigma plus" test.

CONCLUSION

The decision of the Court of Appeals for the Third Circuit which sustained the summary judgement entered in favor of the Defendant should be reversed.

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APPENDIX A

United States Court of Appeals,

Third Circuit.

Charlene J. GOOD & Richard C. Good, Appellants,

v.

CITY OF SUNBURY.

No. 08-1571.

Submitted Under Third Circuit L.A.R. 34.1(a) Oct. 2, 2009.

Opinion Filed Nov. 16, 2009.

Appeal from the United States District Court for the Middle District of Pennsylvania (No. 06-CV-02268),Magistrate Judge: Honorable Andrew Smyser[1]

Before AMBRO, GARTH and ROTH, Circuit

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[1]Parties consented to jurisdiction by United States Magistrate Judge Smyser. See Order, Good v. City of Sunbury, 06-cv-2268 (E.D.Pa. Feb. 26, 2007)

Judges.

OPINION

GARTH, Circuit Judge:

Charlene and Richard Good ("the Goods"), husband and wife, own rental properties located at 250-260 Race Street in Sunbury, Pennsylvania ("the Properties"). Charlene Good managed the Properties while Richard Good worked as a car dealer.

On August 9, 2004, the Sunbury City Council passed a resolution establishing a procedure whereby Sunbury could designate property as "nuisance property" if that property was subject to three "founded" police or municipal code violations within a twelve-month period. On July 25, 2005, and August 6, 2005, the Sunbury Code Office sent letters to the Goods advising them of several complaints and violations regarding the Properties. On August 8, 2005, the Sunbury City Council voted to designate the Properties as a "nuisance" because tenants of the Properties allegedly had failed to remove or properly contain their garbage on more than three occasions, in violation of the International Property Maintenance Code.[2]

The nuisance designation was subsequently published in the local newspaper and announced on local television stations. The Goods objected to this label,

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[2]Tenants allegedly left bags of trash and loose garbage lying in and around the back yards of the rental units.

claiming that the procedure for nuisance designation did not meet due process standards, that there was no procedure to challenge a nuisance designation, and that the terms "founded" and "nuisance," as they applied relative to the August 9, 2004 resolution, were not adequately defined. On September 13, 2005, the City Council removed the Properties from the "nuisance" list.

Allegedly as a result of her Properties being deemed a nuisance for slightly over a month, Charlene Good claims to have suffered severe psychological and emotional harm. She provided an expert report from her psychologist supporting this contention, and Sunbury's own expert concurred that Mrs. Good suffered from Post Traumatic Stress Disorder as a result of Sunbury's conduct.

The Goods filed suit in District Court on November 22, 2006, alleging violations of 42 U.S.C. § 1983 and the Fifth and Fourteenth Amendment Due Process Clauses, as well as supplemental state law claims for defamation, intentional infliction of emotional distress, and invasion of privacy. Sunbury moved for summary judgment on December 4, 2007. On February 5, 2008, the District Court granted summary judgment for Sunbury on the Fifth Amendment claim because "the Fifth Amendment is not applicable to state action." Memorandum and Order, Good v. City of Sunbury, NO. 06-CV-2268 (E.D.Pa. Feb. 5, 2008) ("D.C.Op.") at 8.

The District Court also granted summary judgment on the Fourteenth Amendment claim because the Goods suffered no loss aside from stigmatization and because "psychological injury is not a loss or deprivation that is independent of the stigmatization of the property owner as a result of the negative labeling of the property." Id. at 12. The court declined to exercise supplemental

jurisdiction over the state law claims and thus dismissed the case. Id. at 13.

The Goods timely appealed with regard to their Fourteenth Amendment claim.

I.

"Our review of the District Court's grant or denial of summary judgment is plenary, and we apply the same standard that the District Court applied in determining whether summary judgment was appropriate." *Biliski v. Red Clay Consol. Sch. Dist. Bd. of Educ* ., 574 F.3d 214, 218 (3d Cir.2009) (quoting *Norfolk S. Ry. v. Basell USA Inc.*, 512 F.3d 86, 91 (3d Cir.2008). Summary judgment is warranted if, drawing all inferences in favor of the non-moving party, "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED.R.CIV.P. 56©. Since there are no disputed facts in this case, we must decide, as a matter of law, whether the psychological harm alleged to have been suffered by Charlene Good as a result of the government's actions is sufficient to sustain a constitutional due process claim based on harm to reputation.

II.

"To state a claim under § 1983 for deprivation of procedural due process rights, a plaintiff must allege that (1) he was deprived of an individual interest that is encompassed within the Fourteenth Amendment's protection of 'life, liberty, or property,' and (2) the procedures available to him did not provide 'due process of law.' " *Hill v. Borough of Kutztown*, 455 F.3d 225, 233-34

(3d Cir.2006) (citing Alvin v. Suzuki, 227 F.3d 107, 116 (3d Cir.2000)). Since we find that the Goods fail to allege a sufficient deprivation, we affirm the District Court's denial of the claim on that basis, and therefore need not engage in an analysis of whether the procedures available to them provided sufficient due process of law.

The Goods argue that the psychological harm suffered by Charlene Good is a sufficient deprivation to sustain a constitutional due process claim for harm to reputation. The Goods reason that mental health implicates one's right to life and liberty because psychological injury can lead to death and disease and the foreclosure of future opportunities. Thus, they argue, psychological harm is distinct from harm to reputation.

The law is well settled that defamation, "standing alone and apart from any other governmental action," is insufficient to state a claim for relief under 42 U.S.C. § 1983 and the Fourteenth Amendment. *Paul v. Davis*, 424 U.S. 693, 694, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). Rather,it is clear that reputation alone is not an interest protected by the Due Process Clause. Rather, to make out a due process claim for deprivation of a liberty interest in reputation, a plaintiff must show a stigma to his reputation plus deprivation of some additional right or interest. This has been referred to as the "stigma-plus"test.

Dee v. Borough of Dunmore, 549 F.3d 225, 233-34 (3d Cir.2008) (quoting *Clark v. Twp. of Falls*, 890 F.2d 611, 619 (3d Cir.1993), and *Hill*, 455 F.3d at 236) (internal quotation marks and citations omitted). However, while it is established that an allegation of harm to some additional interest (i.e., the "plus" factor) is needed to sustain a due process claim based on defamation, exactly what qualifies as a sufficiently

"tangible interest [ ]," *Paul*, 424 U.S. at 701, is less clear, and has been the source of "some confusion." *Baraka v. McGreevey*, 481 F.3d 187, 208 (3d Cir.2007).

Fortunately, we need not attempt the difficult task of clarifying precisely what type of interests are sufficiently "tangible" to satisfy the "plus" element of the "stigma-plus" test, because our analysis of the Goods' due process claim requires only a determination of whether or not the emotional distress alleged by Mrs. Good is sufficiently tangible to satisfy the "plus" element.

Our holding in *Baraka* is highly instructive in this regard. In *Baraka*, we addressed the claims of a former poet laureate of New Jersey, Amiri Baraka, whose controversial remarks about the September 11 terrorist attacks prompted the state's governor to suggest that Baraka was anti-Semitic. Baraka, 481 F.3d at 194. The governor and legislature subsequently abolished the position of poet laureate, and Baraka sued, alleging, inter alia, that he was deprived of a constitutionally protected interest in his reputation. Id. at 194-95.

In addressing Baraka's claim, we noted that "[r]eputational harm can constitute a protected interest [only] when coupled with an additional deprivation of a protected right or interest." Id. at 208. We held that Baraka had failed to plead an additional deprivation of a protected interest or shown a foreclosure of future opportunities to couple with his reputational harm, and therefore affirmed the District Court's dismissal for failure to state a claim for deprivation of a constitutionally protected interest in his reputation. Id. at 209.

Of particular interest to the case sub judice is the fact that although "Baraka allege[d] defendants caused 'irreparable damages to his reputation, embarrassment, humiliation and emotional distress,' " id. at 209 n. 17 (emphasis added), we nonetheless found that he failed to plead the "plus" factor necessary to the "stigma-plus" test. Accordingly, in Baraka we at least strongly suggested that the emotional distress suffered attendant to reputational harm does not constitute a valid "plus" factor for purposes of the "stigma plus" requirement. This conclusion is buttressed by our earlier holding in *Kelly v. Borough of Sayreville, N.J.*, 107 F.3d 1073 (3d Cir.1997), where we held that the plaintiff, who alleged harm in the form of, inter alia, "emotional ... injury," id. at 1076, "has not suffered a deprivation beyond the injury to his reputation [and therefore] has not pleaded a valid claim based on a violation of his liberty interests." Id. at 1078.

An analysis of the interests that have we found to be sufficiently tangible "plus" factors, particularly when contrasted with those that we have deemed insufficiently tangible, leads to the same conclusion regarding the interest at issue here as do our holdings in *Baraka* and *Kelly*.

We have found a sufficiently tangible "plus" when the claimed harm was an injury to a right "created and defined by state statutory law and the [relevant collective bargaining agreement]," *Dee*, 549 F.3d at 234; a deprivation of the "liberty to pursue a calling or occupation," *Thomas v. Independence Twp.*, 463 F.3d 285, 297 (3d Cir.2006); "an injury to [plaintiff's] reputation while in the exercise of [her] constitutional right" to free speech, *Merkle v. Upper Dublin Sch. Dist.*, 211 F.3d 782, 797 (3d Cir.2000); and a "constructive discharge" and consequent damage to plaintiff's "ability to earn a living." *Hill*, 455 F.3d at 232-33.

In contrast, we have found the plaintiff's would-be "plus" too ethereal-and therefore insufficient to support a reputation-based due process claim-when the claimed harm was the "possible loss of future employment opportunities," *Clark,* 890 F.2d at 620; the "temporary removal from [customary] duties," *Edwards v. Cal. Univ. of Pa.,* 156 F.3d 488, 492 (3d Cir.1998); the "den[ial of] a promotion and transfer[ ] ... from the position of manager ... to a [lower] supervisory position," *Robb v. City of Philadelphia,* 733 F.2d 286, 293 (3d Cir.1984); and even outright "financial harm," *Sturm v. Clark,* 835 F.2d 1009, 1013 (3d Cir.1987).

Finally, we note that, in addition to the collective weight of our precedent cited above, there is a sound policy argument militating against a finding that the Goods' claim is legally cognizable. If we were to hold that the emotional trauma resulting from government defamation was, without more, sufficient to constitute the "plus" factor necessary in a Fourteenth Amendment due process liberty claim, virtually every defamation plaintiff would have a constitutional claim ready-made to survive at least to summary judgment, because defamatory remarks or acts, by their very nature, often cause severe distress to their target. Cf. *Merkle,* 211 F.3d at 797 ("This court has warned against equating a state defamation claim with a cause of action under section 1983 predicated on the Fourteenth Amendment.") (quoting Kelly, 107 F.3d at 1078) (quotation marks and alterations omitted). The end result would be the effective elimination of the "plus" requirement of the "stigma-plus" test.

III.

Based on the foregoing, we conclude that Mrs. Good's alleged psychological injury is not sufficient to satisfy the "plus" element of the "stigma-plus" test, and

consequently that the Goods fail to claim sufficient deprivation to support their Fourteenth Amendment due process claim. We therefore hold that the Goods' due process claim fails as a matter of law.[3] The District Court's grant of summary judgment in favor of the City of Sunbury, and against the Goods, will be affirmed.

APPENDIX B

United States District Court,

M.D. Pennsylvania.

Richard C. GOOD, et al., Plaintiffs

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[3]In so holding, we do not mean to imply that we in any way discount, dismiss or belittle the seriousness of the psychological trauma allegedly suffered by Mrs. Good. Throughout our opinion, we speak of the tangible (or intangible) nature of interests only as that term was used by the Supreme Court in Paul. As such, our conclusion that Mrs. Good's alleged psychological injury is not 'tangible' should be taken only to mean that, as a matter of law, it lacks the requisite sufficiency to stand as the "plus" factor in the "stigma-plus" test.

v.

CITY OF SUNBURY, Defendant.

Civil No. 4:06-CV-2268.

Feb. 5, 2008.

James L. Best, Sunbury, PA, for Plaintiffs.

Rolf E. Kroll, Margolis Edelstein, Camp Hill, PA, for Defendant.

MEMORANDUM AND ORDER

J. ANDREW SMYSER, United States Magistrate Judge.

The complaint was filed on November 22, 2006. The plaintiffs are Richard C. Good and Charlene J. Good, husband and wife. The defendant is the City of Sunbury, a Pennsylvania municipality. The complaint contains a federal claim, a 42 U.S.C. § 1983 claim, and the court has federal question jurisdiction. 28 U.S.C. § 1331. The complaint also contains state law claims. The

supplemental jurisdiction of the court is invoked. The supplemental jurisdiction of the court may be exercised under 28 U.S.C. § 1367.

The complaint states that the plaintiffs own real estate in the City of Sunbury. They own real estate at 250-260 Race Street, comprised of three buildings, housing ten rental apartment units. It states that the City of Sunbury Code Office has repeatedly notified the plaintiffs that their properties on Race Street are not in compliance with the International Property Maintenance Code, which has been adopted by the City of Sunbury, in that there were allegedly bags of rubbish and trash in the rear yards or rear porches of the rental units. It alleges that the plaintiffs deny that they have violated the International Property Maintenance Code in that their tenants are responsible for trash removal. It alleges that the City has not ever issued a citation to the plaintiffs which, if the City had done so, would have afforded the plaintiffs the opportunity to defend against allegations of violation(s) on the plaintiffs' part.

The complaint alleges that the plaintiffs have always been in compliance with the substantive provisions of the building and property codes of the City of Sunbury.

On August 9, 2004, the complaint states, the City of Sunbury entered a "Resolution" adopting a policy of designating certain properties as " 'Nuisance Properties' if said properties are the subject of three or more 'founded' code complaints within a twelve month period." The Resolution was not advertised or enacted as an ordinance. The Resolution did not define "nuisance" or "founded." It did not provide for any "procedural or substantive proceedings to allow a property owner to challenge or defend a designation of 'nuisance property.' "

On July 25, 2005, the City of Sunbury's Code Office sent a letter to the plaintiffs stating that a list of complaints and violations would be presented to the City Council on August 8, 2005 and that the July 25, 2005 letter was a warning letter. The letter did not state to them that the Code Officer was asking the Council to designate the plaintiff's property as a "nuisance." On August 6, 2005, the Code Office sent another letter to the plaintiffs concerning tenants' trash. On August 8, 2005, the City Council declared the plaintiffs' property a "nuisance." The designation was published in the Sunbury Daily Item and on WNEP Channel 16 television.

The complaint states that the plaintiffs' reputations were damaged. It states that plaintiff Charlene Good, who was responsible for the day-to-day management of the properties, and plaintiff Richard Good, a car dealer, suffered physical, economic and psychological harm, pain and suffering.

The complaint asserts that the City followed unfair procedures, that there was not a factual basis for the "nuisance" designation, that the plaintiffs did not violate any municipal ordinance or law, and that the events caused a violation of the plaintiffs' constitutional and statutory rights.

The first cause of action is that the Fifth and Fourteenth Amendment due process rights of the plaintiffs were violated by the City. The second cause of action is based upon state law: defamation, intentional infliction of emotional distress, and invasion of privacy. Compensatory and punitive damages are sought, as well as attorneys' fees and costs.

An answer to the complaint was filed on January 23, 2007. (Doc. 6). The defendant filed a motion for summary judgment on December 4, 2007, and a brief in support. (Docs.20, 21). A LR 56.1 statement of facts was filed. (Doc. 22). A brief in opposition was filed on January 16, 2008. (Doc. 28). No reply brief has been filed.

Based upon the defendant's LR 56.1 statement of material facts, the absence of disagreement by the plaintiffs with the material facts as stated by the defendant, and the provisions of LR 56.1, the material facts FN1 for the purposes of this motion are:

FN1. The material facts stated in 10, 11, 12 and 13 are statements of law or restatements of the legal claims set forth in the pleadings.

1. Plaintiffs' case was commenced by filing a Complaint with this Honorable Court on or about November 22, 2006.

2. Plaintiffs, Richard C. Good and Charlene J. Good ("Plaintiffs"), are adult individuals who own property located at 250-260 Race Street in the City of Sunbury.

3. The code office of the City of Sunbury has repeatedly notified the Plaintiffs that their properties on Race Street are out of compliance with the International Property Maintenance Code in that there were bags of rubbish and trash in the rear yards or porches of the rental units.

4. Notices of said violations were given.

5. On or about August 9, 2004, Defendant, City of Sunbury ("Sunbury"), entered a [resolution] adopting a

policy of designating certain properties as "nuisance properties" if said properties are the subject of three or more founded code complaints within a 12-month period.

6. The Resolution does not define the term "nuisance" or the term "founded."

7. On or about July 25, 2005, Sunbury forwarded the Plaintiffs a letter advising them that a list of complaints and violations would be presented to the City Council on August 8, 2005. On August 6, 2005 the code office sent another notice concerning tenant's trash.

8. On August 8, 2005, the council of Sunbury declared Plaintiffs' property a "nuisance." This designation was published in the Sunbury Daily Item and on WNEP Channel 16 television.

9. The designation was removed on or about September 13, 2005.

(Doc. 22, internal citations omitted).

Summary judgment is appropriate if the "pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56©. The moving party bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The moving party may discharge that burden by "

'showing'-that is, pointing out to the district court-that there is an absence of evidence to support the nonmoving party's case." Id. at 325. Once the moving party has met its burden, the nonmoving party may not rest upon the mere allegations or denials of its pleading; rather, the nonmoving party must "set out specific facts showing a genuine issue for trial." Fed.R.Civ.P. 56(e).

An issue of fact is " 'genuine' only if a reasonable jury, considering the evidence presented, could find for the non-moving party." *Childers v. Joseph*, 842 F.2d 689, 693-94 (3d Cir.1988) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). A material factual dispute is a dispute as to a factual issue that will affect the outcome of the trial under governing law. Anderson, supra, 477 U.S. at 248. In determining whether an issue of material fact exists, the court must consider all evidence in the light most favorable to the non-moving party. *White v. Westinghouse Electric Co.*, 862 F.2d 56, 59 (3d Cir.1988).

"[T]he plain language of Rule 56© mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, supra, 477 U.S. at 322. "Under such circumstances, 'there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.' " *Anderson v. CONRAIL*, 297 F.3d 242, 247 (3d Cir.2002) (quoting *Celotex*, supra, 477 U.S. at 323).

The defendant argues that it is entitled to summary judgment as to the Fifth Amendment due process claim because the Fifth Amendment is not applicable to state action. This is well settled. *Nguyen v. U.S. Catholic Conference*, 719 F.2d 52, 54 (3d Cir.1983). The defendant is entitled to judgment as to the Fifth Amendment claim.

The defendant argues that it is entitled to summary judgment as to the plaintiffs' Fourteenth Amendment due process claim because the nature of the deprivation or loss allegedly caused to the plaintiffs by the municipal government was a deprivation or loss of reputation and because a loss or deprivation of one's good reputation is not as a matter of law a loss of life, liberty or property. It has been affirmed in several decisions that a potential loss of reputation does not of itself give rise to the right to due process. *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976); *Hill v. Borough of Kutztown*, 455 F.3d 225 (3d Cir.2006); *Edwards v. California University of Pennsylvania*, 156 F.3d 488 (3d Cir.1998); *Kelly v. Borough of Sayreville, N.J.*, 107 F.3d 1073 (3d Cir.1997); *Kline v. City of Sunbury*, No. 4:07-CV-0932 (M.D.Pa., Oct. 29, 2007, Jones, J.). However, when there is a prospect for stigma or the deprivation of one's good reputation as the result of a municipal or state government's action, and there is also another prospective loss of a right or interest, a municipal or state actor must afford due process in imposing such a deprivation or loss. *Hill,* supra. In this case, the plaintiffs have argued in opposing summary judgment that there was a loss and deprivation in addition to the deprivation and loss of the plaintiffs' good reputation in that plaintiff Charlene Good has suffered significant psychological harm as the result of the municipal defendant's actions. We must decide whether a property owner's psychological injury arising from a municipality's labeling of her

property as a "nuisance property" is materially the same as a public employee's loss of his or her job arising from or incidental to a public employer's stigmatization of the public employee. The question is whether the two are materially the same in the sense that they constitute a "plus" in the "stigma plus" context.

It is important to note at the outset that the psychological injury of plaintiff Charlene Good is not a form of a deprivation or loss of a right or an interest of itself, but rather is one potentially compensable form of injury allegedly resulting from the government imposed stigma. It is materially the same for analytical purposes here as would be economic loss resulting from a devaluation of the property because of the stigmatization of the property. The plaintiffs argue that "Ms. Good's psychological injuries are an additional deprivation of rights or liberties which constitute the 'plus' of the stigma plus test." It is arguably erroneous, however, to equate an injury allegedly caused by the deprivation of a right (for example, a broken leg caused by a negligently driven car) to the deprivation of a right (in the case of a broken leg, the right to the driver's exercise of due care). Charlene Good's alleged psychological injury is an injury allegedly caused by the alleged deprivation of a right. It is not itself the deprivation of a right. There is not a legal right protected by the Due Process Clause not to be psychologically injured.

In *Kline*, the Court decided that a claim of an alteration of the plaintiff's status "from a law abiding citizen to a non-law abiding citizen who has created a detriment to the neighborhood and takes no pride in maintaining his property" is not materially distinguishable from the alleged stigma of the declaration

of a "nuisance property." The plaintiffs here seek to distinguish Kline by asserting that there the plaintiff did not claim any physical or emotional harm as a result of the nuisance designation.

In *Hill,* the Court held that the stigma-plus standard is met when a public employee has been stigmatized by his or her public employer and also has lost his or her job, even if he or she has no property interest in the job that he or she has lost. 455 F.3d at 238.

The harm allegedly caused to plaintiff Charlene Good as an alleged result of having been stigmatized by the City is not an injury as independent from the injury of being stigmatized as the injury of being constructively discharged from one's public employment is from the injury of being stigmatized by one's public employer. We do not necessarily believe that there is a principled bright line distinction to be drawn between the two, however, and will not hold that there is.In *Edwards*, the Court had held that stigma alone, although without due process, does not give rise to a procedural due process claim. Edwards, like the later Hill case, had involved the alleged stigmatization of an employee by a public employer. In the earlier decision in Kelly, where the case had also involved a public employer's statements of criticisms and negative disclosures about the public employee plaintiff, it is plain that the Court was focusing upon the matter of actual and tangible monetary loss in its analytical distinction of the plaintiff's claim of a due process violation from a claim of a due process violation based upon stigmatization upon which relief could be granted. The Court had implied that the loss of one's employment would satisfy the "plus" requirement, as it later held in Hill.

In the context of a public employee's stigmatization

by the public employer, the Third Circuit has said that the loss of the job in addition to the stigmatization would state an actionable procedural due process claim. The Third Circuit has not said whether a public employee's psychological injuries would constitute a "plus" such as would give rise to an actionable procedural due process claim.

The comparison of the public employee's interests to those of the owner of real estate involves material analogical dissimilarities. In the public employee context the alleged employer-caused stigma is to the employee directly, whereas in the case of a "nuisance" declaration the stigmatization is directly leveled at the property, not at its owner. The real estate owner is stigmatized indirectly by implication.

Although it is acknowledged that the issue is not without substantial arguments on both sides, we conclude that there is not a basis in the summary judgment record to find there to be a genuine factual dispute as to whether there was a loss or deprivation other that stigmatization, and that a reasonable jury could not find a deprivation other than stigmatization, for the reason that the psychological injury is not a loss or deprivation that is independent of the stigmatization of the property owner as a result of the negative labeling of the property. Therefore, by application of the above-cited Third Circuit decisions, we conclude that there is not a Fourteenth Amendment procedural due process claim that survives the summary judgment motion.

The defendant is entitled to summary judgment upon the plaintiffs' federal claims. The court will not retain jurisdiction for the purpose of the state law claims.

IT IS ORDERED that summary judgment is GRANTED in favor of the defendant and against the plaintiffs upon the federal law claims and that the complaint is otherwise DISMISSED. The Clerk of Court shall enter judgment accordingly.

IT IS FURTHER ORDERED that the pretrial conference and trial are cancelled.